BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELLEN K. WEAVER	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,468
WARNER MANUFACTURING COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
GRANITE STATE INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the Award of Administrative Law Judge Alvin E. Witwer dated July 25, 1995. The Appeals Board heard oral argument on December 7, 1995.

APPEARANCES

The claimant appeared by her attorney, Gary L. Jordan of Ottawa, Kansas. The respondent and its insurance carrier appeared by their attorney, James M. McVay of Great Bend, Kansas. The Workers Compensation Fund appeared by its attorney, Eugene C. Riling of Lawrence, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a twenty-nine and one-half percent (29½%) permanent partial general

disability. The claimant requested review of the issue of nature and extent of disability, and contends the Administrative Law Judge erred in imputing a post-injury average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds the Award should be modified.

Claimant worked for the respondent as a seamstress for approximately ten (10) years. In May 1992, claimant began treatment with board-certified orthopedic surgeon Lynn D. Ketchum, M.D. The doctor performed left carpal tunnel release in January 1993 and right carpal tunnel release in April 1993. In June 1993, Dr. Ketchum released claimant to return to light duty, and in July 1993 released her to regular duty without restrictions. At that time he believed claimant had sustained an eighteen percent (18%) functional impairment to the body as a whole.

Following her return to work, claimant's symptoms gradually recurred. In November 1993, claimant returned to Dr. Ketchum for additional treatment. Despite cortisone injections into the wrists, claimant's symptoms persisted and worsened. Dr. Ketchum offered additional surgery which claimant declined. The doctor treated claimant through February 1994 and believes claimant's functional impairment increased to twenty-four percent (24%) to the body as a whole as a result of her work activities. He now believes claimant should observe permanent work restrictions.

In February 1994, claimant concluded she could no longer perform the work of a seamstress and notified her supervisor and the plant manager she would have to leave respondent's employment because of the increased pain in her hands and arms. At respondent's request, claimant agreed to continue to work until a replacement was found. Claimant's last day of work for the respondent was March 1, 1994, when she was notified she was being laid off due to lack of work. Later that month the plant manager asked claimant to return to work but claimant declined and advised the plant manager she could no longer do the work because her arms hurt too badly.

In July 1994, claimant began working as a sales clerk for Wal-Mart on a part time basis for four dollars and seventy cents ($4.70) per hour. As of the date of the regular hearing, claimant worked approximately twenty-four (24) hours per week and grossed approximately one hundred twelve dollars and eighty cents ($112.80) per week. Claimant testified this is the best job she has been able to find within her permanent work restrictions. Wal-Mart has not offered claimant full-time employment. Because she doubts she could perform the job on a full-time basis, claimant has not asked Wal-Mart for a full-time position.

After leaving work in March 1994, respondent did not offer claimant an accommodated position. Claimant testified she could not return to work as a seamstress without violating either Dr. Ketchum's restrictions or those of Dr. Lanny Harris, a board-certified orthopedic surgeon who examined claimant at the Administrative Law Judge's request.

The Administrative Law Judge found claimant had proven it was more probably true than not that claimant sustained personal injury by accident arising out of and in the course

of her employment with the respondent through her last day of work on March 1, 1994, and also found that date should be designated the date of accident for purposes of this Award. In addition, the Judge found claimant had sustained a seventy-five percent (75%) loss of ability to perform work tasks after considering the entire record and performing the analysis required by K.S.A. 44-510e. The parties do not request review of those findings and, finding they are supported by the evidence, the Appeals Board adopts those findings as its own.

Because hers is an unscheduled injury to both upper extremities, claimant's right to permanent partial general disability benefits is governed by K.S.A. 44-510e(a), which provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

As this statute requires, the Administrative Law Judge must average the percentage of loss of ability to perform work tasks with the percentage difference between the average weekly wage the worker was earning on the date of the accident and the wage the worker is earning after the injury. However, in the case now before us, rather than using claimant's actual post-injury earnings of one hundred twelve dollars and eighty cents ($112.80) per week, the Administrative Law Judge found that claimant could perform her duties at Wal-Mart on a full-time basis and, therefore, could earn one hundred eighty-eight dollars ($188.00) per week which would yield a wage loss of twenty percent (20%) when compared to the stipulated pre-injury average weekly wage of two hundred thirty-seven dollars and twenty cents ($237.20).

Claimant contends the Administrative Law Judge erred by imputing the projected full-time wage. The Appeals Board agrees. First, K.S.A. 44-510e unequivocally states that the trier of fact is to consider the difference between actual pre-injury and post-injury wages. Second, the rationale of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), is not applicable because in that case respondent offered claimant an accommodated job and the claimant refused to even attempt to perform the job. The Court of Appeals held that a worker should not be allowed to manipulate the computation of work disability by refusing to work. The applicable version of K.S.A. 44-510e governing the Foulk decision required the trier of fact to consider both loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage. However, in proceedings for injuries occurring after July 1, 1993, the formula for determining work disability is different as the trier of fact is required to average the loss of tasks with the loss of actual wages. For injuries after July 1, 1993, the trier of fact should impute post-injury wages only when the respondent has offered employment within the worker's restrictions or in certain other limited situations such as where the worker has voluntarily removed themselves from the labor market in an attempt to improperly manipulate the work disability. One of the primary reasons the 1993 Kansas Legislature modified K.S.A. 44-510e was to avoid the "battle of the experts" over the issue of a worker's post-injury ability to earn comparable wages. Therefore, in the absence of

a worker attempting to wrongfully manipulate their loss of wages to improperly inflate the work disability, the trier of fact should use actual post-injury wages.

Because respondent did not offer claimant employment within her restrictions after the March 1, 1994 accident, the appropriate post-injury wage to use to determine claimant's loss of wages is one hundred twelve dollars and eighty cents ($112.80), the approximate amount that claimant testified she now earns at Wal-Mart. Based upon this finding, claimant's loss of wages is fifty-two percent (52%) and is derived by comparing claimant's stipulated pre-injury average weekly wage of two hundred thirty-seven dollars and twenty cents ($237.20) to the post-injury wage of one hundred twelve dollars and eighty cents ($112.80). Therefore, averaging the seventy-five percent (75%) task loss with the fifty-two percent (52%) wage loss, the Appeals Board finds claimant's work disability to be sixty-three and one-half percent (63½%). As required by K.S.A. 44-510(c), subtracting the preexisting functional impairment rating of eighteen percent (18%) from the sixty-three and one-half (63½%) work disability yields a permanent partial general disability of forty-five and one-half percent (45½%) for which the claimant is entitled to receive permanent partial disability benefits.

The respondent, its insurance carrier and the Workers Compensation Fund contend the Appeals Board should deny claimant's request for compensation because claimant has unreasonably refused to submit to the second round of surgical treatment Dr. Ketchum offered. Although the doctor believes there is a good possibility the surgery would benefit claimant, he also believes claimant's decision to forego the second surgery on her hands and wrists was reasonable. In light of the fact that claimant had already undergone bilateral carpal tunnel releases which only temporarily alleviated her symptoms and considering the attendant risks associated with surgery, the Appeals Board finds that claimant did not unreasonably refuse medical treatment to cause the denial of compensation as contemplated by Director's Rule 51-9-5.

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge to the extent they are not inconsistent with those made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated July 25, 1995, should be, and hereby is, modified; that claimant is entitled to permanent partial general disability benefits based upon a 45½% work disability and based upon an average weekly wage of $237.20.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ellen K. Weaver, and against the respondent, Warner Manufacturing Company, Inc., and its insurance carrier, Granite State Insurance Company, for an accidental injury which occurred March 1, 1994, and based upon an average weekly wage of $237.20, for 188.83 weeks at the rate of $158.14 per week or $29,861.58 for a 45½% permanent partial general disability.

As of December 29, 1995, there is due and owing claimant 95.43 weeks of permanent partial disability compensation at the rate of $158.14 per week in the sum of $15,091.30 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $14,770.28 is to be paid for 93.40 weeks at the rate of $158.14 per week, until fully paid or further order of the Director.

Claimant is entitled to future medical care upon proper application to the Director.

The Kansas Workers Compensation Fund is responsible for 80% of all compensation benefits herein awarded the claimant, as well as 80% of future medical expenses, with the respondent-insurance carrier to be responsible for the remaining 20% of all compensation due the claimant or to be due in the future.

Claimant's contract of employment with her attorney has been made a part of the record. Such is approved, and the claimant's attorney is granted a lien against the proceeds of this award as specified by the contract of employment, and pursuant to K.S.A. 44-536.

All necessary fees to defray the expense of the administration of the Workers Compensation Act for the State of Kansas are assessed 20% against the respondent-insurance carrier and 80% against the Workers Compensation Fund as follows:

Curtis Schloetzer, Hedburg, Foster & Associates	$298.45
Hostetler & Associates, Inc.	$788.10
Kelli Forbes, C.S.R.	$404.80

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary L. Jordan, Ottawa, Kansas
James M. McVay, Great Bend, Kansas
Eugene C. Riling, Lawrence, Kansas
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director